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United States Supreme Court

October Term, 1970

Supreme Court, U.S.
FILED
MAR 4 1971
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No. 1433

THE FLINTKOTE COMPANY,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

United States Supreme Court

OCTOBER TERM, 1970

No. .....

THE FLINTKOTE COMPANY,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit, entered in this case on January 4, 1971.

The Opinion Below

The opinion of the United States Court of Appeals (A1) has not yet been reported.

The opinion of Mansfield, J. in the United States District Court (A-5), which was adopted by the Court of Appeals, is reported at 47 F. R. D. 322.

The opinion of the United States District Court (Frankel, J.) (A-15), which was affirmed, is not reported.

Jurisdiction

The judgment of affirmance was entered on January 4, 1971, and this petition is being filed less than ninety days from that date. The jurisdiction of this court is invoked under 28 U. S. C. §1254(1).

The Question Presented

May the United States bring an action to enforce a trust created by Article 3-A of the New York Lien Law, even though the action is not commenced within the time limited by that statute?

The Statute Involved

As far as relevant, the statute relied upon, which is part of Article 3-A of the Lien Law, reads as follows:

> "§77. *Action to enforce trust*
>
> 1. A trust arising under this article may be enforced by the holder of any trust claim, including any person subrogated to the right of a beneficiary of the trust holding a trust claim, in a representative action brought for the benefit of all beneficiaries of the trust. An action to enforce the trust may also be maintained by the trustee. In any such action, except as otherwise provided in this article, the practice, pleadings, forms and procedure shall conform as nearly as may be to the practice, pleadings, forms and procedure in a class action.
>
> 2. Such action may be maintained at any time during the improvement of real property or public

improvement and successive actions may be maintained from time to time during the improvement provided no other such action is pending at the time of the commencement thereof. *No such action shall be maintainable if commenced more than one year after the completion of such improvement, except an action by the trustee for final settlement of his accounts and for his discharge.*

3. (a) The relief granted in *any such action* may include any or all of the following:

(i) Relief to compel an interim or final accounting by the trustee; to identify and recover trust assets in the hands of any person; *to set aside as a diversion any unauthorized payment, assignment or other transfer,* whether voluntary or involuntary; to enjoin a diversion; to recover damages for breach of trust or participation therein; * * * " (Emphasis supplied.)

"Trust" is defined in §70 of the Statute as including "the funds received by an owner for or in connection with an improvement of real property in this state * * *".

The claim of the United States was asserted under §77 (3a)(i) "to set aside as a diversion" an alleged unauthorized payment to petitioner.

Statement of Facts

The action was brought by petitioner in the New York Supreme Court, for a declaratory judgment to the effect that tax liens which the United States had filed as against Westchester Wallboard Corporation ("Westchester") did not attach to a payment to petitioner, as assignee of "Westchester", of $10,000, made by Gateway Construction Corporation ("Gateway").

The United States removed the action to the District Court, and on September 12, 1968, filed an answer containing a third-party complaint, whereby it sought to impose a trust under §77 of the Lien Law to set aside as a "diversion" the money paid by "Gateway" to petitioner.

The sole question presented is whether the filing of that cross-complaint was timely, in view of the fact that it was not filed within one year after the completion of the improvement involved, as required by §77(2) of the statute. Petitioner raised the question by moving for summary judgment dismissing the third-party complaint, and on February 18, 1969, Judge Mansfield denied that motion (A-8), holding, first, that a question of fact was presented as to the time of completion of the improvement. (That objection was later overcome on a renewed motion for summary judgment when the Government conceded that the cross-complaint had *not* been timely filed).

Judge Mansfield had also held that in any event the time limitation contained in the statute did not bar the Government's claim, since it was not a condition precedent but an ordinary Statute of Limitations, and as such, not binding upon the United States.

In so holding, the learned judge relied on what had been said in a New York Supreme Court decision, *Davis & Warshow, Inc.* v. *Iser, Inc.*, 30 Misc. 2d 528 (1961), where a New York trial court had described the time limitation in the statute as procedural rather than substantive. Petitioner had urged that that decision should not have been accepted as authority because it was obviously erroneous and contrary to decisions of New York appellate courts.

After obtaining proof that the improvement had been completed almost four years before the filing of the Government's third-party complaint, a motion for summary

judgment was renewed before Judge Frankel, when it was also pointed out that later decisions of the New York Court of Appeals, including *Harman* v. *Fairview Associates*, 25 N. Y. 2d 101 (1969) had indicated clearly that the time limitation contained in the statute was a condition precedent to any action to enforce a trust, unless asserted in a trustee's action "for final settlement of his accounts," and *then only because of the specific exception to that effect set forth in the statute.*

That motion was denied by Judge Frankel, who granted a cross-motion for summary judgment in favor of the Government, saying that he declined to go over the same ground that Judge Mansfield had traversed, and that he had examined the later opinions of the New York appellate courts and did not find any basis *"in them"* (emphasis his) for departing from Judge Mansfield's conclusion.

The Court of Appeals affirmed *per curiam* on the basis of what Judge Mansfield had said, and in agreement with Judge Frankel's view that the subsequent New York appellate decisions "did not undercut the force of his reasoning" (A-4).

Reasons for Granting the Writ

The decision below, which interprets the statute as an ordinary procedural Statute of Limitations, not binding on the United States, is in direct conflict with applicable state law as repeatedly enunciated by the New York appellate courts. Both Judge Mansfield's decision and that of Judge Frankel relied on the reasoning and authority of a single *nisi prius* decision that is demonstrably erroneous, and in conflict with New York appellate decisions.

It is undisputed that a true Statute of Limitations *would* be ineffective against the United States; but this statute,

first enacted in 1942, conferred a right unknown to the common law, and therefore qualified the exercise of that right by the limitation of time contained therein. That time element is thus a valid condition inhering in the right itself, confining it within the limit so set, *even as against the United States*. *Custer* v. *McCutcheon* (1930) 283 U. S. 544; *U. S.* v. *Tacoma Gravel Co.* (C. A. 9, 1967) 376 F. 2d 343.

New York appellate courts have uniformly held that where, as here,

> " a statute creates a cause of action and attaches a time limitation to its commencement, the time is an ingredient of the cause"

and that

> "lapse of the statutory period operates therefore to extinguish the right altogether." *Romano* v. *Romano* (1967) 19 N. Y. 2d 444, 447-448, and cases cited; 35 N. Y. *Juris, Limitations and Laches,* §58.

In his opinion below, Judge Mansfield stated that since Article 3-A was a creature of New York state law, he was required to pay particular attention to New York decisions "interpreting its purpose", and he added that the only New York case he had found that had faced the question and dealt with the statute's purpose was a *nisi prius* decision, *Davis & Warshow* v. *Iser Inc.,* 30 Misc. 2d 528, where it was held that the time period "is a procedural rather than substantive defense and consequently not a condition precedent, but a statute of limitations" (A-12).

In accepting this as authoritative, Judge Mansfield ignored the general principles clearly and repeatedly enunciated by New York appellate courts, as above shown, regarding the interpretation of a time limitation contained in a statute creating a right, and he thereby ac-

cepted instead as authority the contrary decision of that court of original jurisdiction. Also he accepted blindly the reasoning of that court, though it is transparently fallacious. He thus relied upon the provision in §70(3) of the Lien Law, that

> "The trust of which the owner is trustee shall continue with respect to every asset of the trust until every trust claim arising at any time during the improvement has been paid or discharged, or until all such assets have been applied for the purposes of the trust."

However, that provision as to the *continuance of the trust* certainly cannot be construed as cancelling the provision contained in §77(2), expressly stating that no action to *enforce* the trust "shall be maintainable if commenced more than one year after the completion of such improvement.* * * "

Judge Mansfield further relied, as did *Davis & Warshow,* on the fact that the Law Revision Commission, when proposing the original Article 3-A in 1942—the entire Article, not merely §77(2)—called it "a procedural *Article*", which is true *in part*, but which anyway is merely descriptive. He also based his decision on the fact that that Commission's report said that the statute included "a short period of limitations". In *Davis & Warshow* the court likewise attached great importance to this reference to a "short period of limitations", characterizing it as denoting "a procedural defense * * * rather than a condition precedent to the substantive right".

When enacted in 1942, the statute sub-titled §75 thereof as "Period of Limitations"—but that title surely did not convert it into a *Statute* of Limitations, for a mere heading does not change the plain meaning of a statute. That

title was plainly intended as no more than a shorthand description—a convenient label. The time limit remained a qualification of the right; and, significantly, *no such title is prefixed to the present* §77(2), adopted in 1959.

Calling the time for bringing an action under a statute its "period of limitations" does not transform it into an ordinary Statute of Limitations.

Similarly, *Davis & Warshow* shrugged off as "somewhat ambiguous" what was said in the Commission's *1959* Report, where, in proposing the amendment now contained in §77(2), adding the particular *exception* of an action by the trustee, the Commission stated:

> "An action by the trustee for such relief is made an exception to the rule * * * *but the action cannot be maintained if commenced more than one year after the completion of the improvement.*" (Emphasis supplied.)

There was nothing ambiguous in that statement.

Also overlooked was additional language in the 1959 Report (*McKinney's* Session Laws of 1959, p. 1604) which described §77(2) as "*barring actions commenced more than one year after the completion of the improvement.*" Those words cannot be treated as meaningless. Yet they were never mentioned.

Davis & Warshow has thus no valid reasoning to support it, and it should not have been accepted by Judge Mansfield as an authoritative expression of New York law.

He incorrectly stated (A-14) that *Davis & Warshow* is in accord with the reasoning of the New York Court of Appeals in *Zuroff* v. *Westchester Trust Co.*, 273 N. Y. 200 (1937). A cursory examination of the *Zuroff* case will show that it holds precisely the opposite, drawing

the very distinction petitioner here makes, between a true Statute of Limitations and a condition limiting a right. There, the Court of Appeals held that a statute requiring a claimant to file his claim with the Superintendent of Banks within a specified time was *not* a Statute of Limitations, but a condition precedent, barring the claimant from asserting his claim even though he could have filed it if it were a Statute of Limitations, since he alleged that it was based on fraud which was discovered only after the statutory time had elapsed.

Not only is *Davis & Warshow*, thus adopted by the Court below, inconsistent with *general* principles of interpretation of statutes, but this very statute has been held by the New York Court of Appeals, by implication at least if not directly, to be a conditional limitation on the right. For example, in *Dittmar Explosives* v. *Ottaviano*, 20 N. Y. 2d 498, 508 (1967) the New York Court of Appeals had before it a case where the plaintiff had originally commenced an action to foreclose a mechanic's lien. When it appeared on the trial that such an action could not be maintained, the plaintiff sought to amend the complaint so as to have the action treated as a class action to enforce the trust provisions of the Lien Law. The trial court had refused to permit the amendment, on the ground that it lacked the power, but the Court of Appeals reversed, holding it had the power, and remanded the matter to the Supreme Court, despite the fact that the defendants had alleged that the claim could not in any event be maintained because not made within a year from the completion of the improvement. The Court of Appeals, however, said that there was an issue of fact as to *when* the improvement was completed, and that that could only be resolved on a new trial. But if *Davis & Warshow* had been followed there (as it was not), there would have

been no issue as to when the improvement was completed, for according to *Davis & Warshow* the action could have been brought—as was permitted in that case—regardless of when the improvement was completed.

In *Harman* v. *Fairview Associates*, 25 N. Y. 2d 101 (1969) the United States was a statutory beneficiary under the New York Lien Law. It did not bring any action to enforce the trust, but an action was brought *by the trustee* "for final settlement of his accounts and for his discharge". As already pointed out, §77(2) makes a specific exception of a case in which the action is brought by the trustee for an accounting (added only in 1959), and *for that reason alone* the Court of Appeals held that the Government's claim to enforce the trust, which otherwise was untimely, could be heard *because asserted in the trustee's action for an accounting;* the Court saying at 25 N. Y. 2d 104:

> "Since the action by the trustee was timely, and the trustee itself sought adjudication of rights to the fund, parties who have such rights may assert them *even though the time for an independent action on their part would otherwise have expired.*" (Emphasis supplied.)

And at page 105 the Court said:

> "Since the existence of the trust fund is *asserted by the trustee*, which has brought the action for adjudication of rights to it, no statutory bar, even by time limit or lack of status, is apparent to an assertion by the United States of its tax claim arising from the work which created the trust fund" (Emphasis supplied).

When that case was before the Appellate Division it drew the same distinction, saying at 30 A.D. 2d 494:

> "The contention of Harman that the claims of the United States are barred by its failure to enforce them within one year, under subdivision 2 of Sec. 77 of the Lien Law, is without merit, for *expressly excepted from such time limitation* is an action by the trustee (Friedrich in this case) 'for final settlement of his accounts and for his discharge'" (Emphasis supplied).

Had either the Appellate Division or the Court of Appeals concluded that a true Statute of Limitations existed, it would have disposed of the case summarily by ruling, in accordance with *Davis & Warshow,* that the United States was not barred from asserting its claim at any time, because this was a mere Statute of Limitations. It did not do so. Indeed, the United States Attorney for the Northern District of New York asserted (p. 50, Record on Appeal in *Harman*):

> "The statute of limitations may bar the United States from enforcing its tax claim in an action brought by it against the taxpayer, but it does not bar the trustee * * *."

Thus, in adopting the reasoning of *Davis & Warshow,* and ignoring the decisions of the New York Court of Appeals, the courts below violated the principle enunciated by this Court in the case of *Commissioner of Internal Revenue* v. *Estate of Bosch,* (1967) 387 U. S. 456, 465, to the effect that a decision by a state trial court as to an underlying issue of state law should not be controlling, and that only those of the state's highest courts are controlling.

That principle was also enunciated by this Court in *Erie R. R.* v. *Tompkins,* 304 U. S. 64, and the opinion therein has since been followed in many cases. Thus, in

King v. *Order of United Commercial Travelers* (1947) 333 U. S. 153, this Court held that it was not required that a decision of a Court of Common Pleas of South Carolina be accepted as setting forth state law. Also, a decision of the Pennsylvania Court of Common Pleas has been rejected for the same reason. *Sunbeam Corporation* v. *Civil Service Employers*, 187 F. 2d 768; and 195 F. 2d 572, cert. den. 342 U. S. 909.

In *Lockhart* v. *Garden City Bank*, 116 F. 2d 658, 662, the Second Circuit held, in 1940, that it was not obliged to accept the decision of a single judge of the New York Supreme Court as to the New York law; and in 1969, in the case of *Perma Research Co.* v. *The Singer Co.*, 410 F. 2d 572, the same court refused to accept as stating the New York law even a decision of a New York Appellate Division, on the ground that there was reason to believe that the New York Court of Appeals would not follow "the somewhat aberrational holding of that case".

In New York it is well established that decisions of courts of original jurisdiction, such as decided *Davis & Warshow*, are not controlling as precedents: 1 Carmody-Wait, *New York Practice*, 2d, ed., §2:58; *In re*: *Herle's Estate*, 165 Misc. 46, 50-51, and cases there collated.

What was said by Chief Justice Hughes in this Court in *Fidelity Trust Co.* v. *Field*, 311 U. S. 169, at pp. 179-180, is entirely *à propos* here:

> "The question has practical aspects of great importance in the proper administration of justice in the Federal courts. It is inadmissible that there should be one rule of state law for litigants in state courts and another rule for litigants who bring the same question before the Federal courts owing to the circumstances of the diversity of citizenship."

While the instant case was not removed by the Government by reason of diversity of citizenship, but for different reasons, the same principle applies, viz.: Is the Government to obtain more favorable treatment by exercising its right so to remove the case than it would if it allowed the case to remain in the state court, where it could have been heard? And there is also the practical consideration that the question presented here involves the application of the New York statutes to the enforcement of the United States tax laws. Surely it is as inadmissible here as it was stated to be in the *Fidelty Trust Co.* case that a different result should be expected in the one forum from that to be anticipated in the other. If such expectation is to prevail, it can only result in uncertainty and confusion in the collection of taxes.

It is therefore respectfully urged that the petition for certiorari be granted.

Dated New York, February 26, 1971.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 321—September Term, 1970.

(Argued December 10, 1970 Decided January 4, 1971.)

Docket No. 34895

THE FLINTKOTE COMPANY,

Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

UNITED STATES OF AMERICA, &c.,

Third-Party Plaintiffs-Appellees,

—v.—

GATEWAY CONSTRUCTION CORPORATION and WESTCHESTER WALLBOARD CORPORATION,

Third-Party Defendants,

—and—

THE FLINTKOTE COMPANY,

Third-Party Defendant-Appellant.

Before:

LUMBARD, *Chief Judge*,
FEINBERG, *Circuit Judge* and CLARIE, *District Judge*.*

Appeal from a summary judgment in favor of the United States granting recovery of $8,571.07 on claims for unpaid taxes, entered in the Southern District of New York, Frankel, *J.*, pursuant to a decision on a prior motion, Mansfield, *J.*, 47 F.R.D. 322. Affirmed.

SIDNEY S. BOBBÉ, New York, N. Y. (Herbert G. Kreisberg, on the brief), *for appellant.*

DAVID M. BRODSKY, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, and Michael I. Saltzman, Assistant United States Attorney, on the brief), *for defendant-appellee, third-party plaintiffs-appellees.*

PER CURIAM:

Flintkote commenced this action against the United States in New York State Supreme Court seeking a declaratory judgment that certain tax liens asserted against Westchester Wallboard Corporation did not apply to monies owed by Gateway Construction Corporation to Flintkote. The government removed the action to the Southern District of New York. The United States by way of counterclaim sought to set aside payments made by Gateway to Flintkote on the ground that these payments were diver-

* Sitting by designation.

sions of trust assets, to compel an accounting by Gateway, and to impose a trust under New York Lien Law §§70-79a.

On February 18, 1969, in an opinion reported at 47 F.R.D. 322, Judge Mansfield denied Flintkote's motion for summary judgment, holding that the one-year period of limitations contained in §77(2) of the Lien Law does not bar the government's action.[1] With this issue decided, and other facts stipulated, when the government moved for summary judgment, Judge Frankel granted the motion in an unreported opinion dated January 12, 1970. We affirm.

The relevant facts are as follows: On May 4, 1964, Gateway, a general contractor building an apartment house in Yonkers, subcontracted some installation work to Westchester. Flintkote entered into an agreement with Westchester to finance its payroll and materials needs. Simultaneously, Westchester assigned to Flintkote all of its rights under the contract, and Gateway agreed to this assignment. Flintkote, upon receipt of payments from Gateway, was to apply them to Westchester's account and remit any excess to Westchester.

Westchester failed to make payments to the government for certain payroll taxes generated by the Gateway project, and the government made tax assessments against Westchester. Work on the improvement was completed in 1964. Westchester subsequently became insolvent. Although Flintkote had performed its agreement, it did not receive full payment from Gateway. On March 31, 1967, Flintkote

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1 Section 77(2) provides:

> "Such action [to enforce trust] may be maintained at any time during the improvement and successive actions may be maintained from time to time during the improvement provided no other such action is pending at the time of the commencement thereof. No such action shall be maintainable if commenced more than one year after the completion of such improvement, except an action by the trustee for final settlement of his accounts and for his discharge."

and Gateway settled their differences, Gateway agreeing to pay $30,000, of which $10,000 would be held in escrow until the rights of the United States under its tax liens could be determined. Flintkote then commenced the present action.

For the reasons stated in Judge Mansfield's opinion, 47 F.R.D. 322, we affirm. We also agree with Judge Frankel's unreported memorandum holding that dicta in two New York Court of Appeals cases decided subsequent to Judge Mansfield's opinion do not undercut the force of his reasoning. These two cases are *Harman* v. *Fairview Associates*, 25 N Y 2d 101, 302 N Y S 2d 791 (1969), and *Onondaga Commercial Dry Wall Corp.* v. *150 Clinton Street*, 25 N Y 2d 106, 302 N Y S 2d 795 (1969). We find no indication that the Court of Appeals considered the issue here presented in those cases.

Affirmed.

Opinion of Judge Mansfield on Prior Motion for Summary Judgment, Dated February 18, 1969

Mansfield, D. J.

This action, which was removed from the New York County Supreme Court, seeks a declaration that certain tax liens asserted by the Government, defendant and third-party plaintiff, against third-party defendant Westchester Wallboard Corporation ("Westchester") do not attach to monies owed by third-party defendant Gateway Construction Corporation ("Gateway") to plaintiff, The Flintkote Company ("Flintkote"). The Government, by way of a counterclaim and third-party complaint against Gateway, Westchester and Flintkote, sought to impose a trust under Article 3-A of the Lien Law of New York (Lien Law §§70-79a), to set aside certain payments made by Gateway to Flintkote on the ground that said payments were diversions of trust assets, and to compel an accounting on the part of Gateway.

Flintkote now moves, pursuant to Rule 56, F. R. C. P., for summary judgment granting the relief requested in its complaint and dismissing the third-party complaint on the grounds that there is no defense to plaintiff's cause of action and that the third-party complaint is untimely and fails to state a claim upon which relief can be granted. Third-party defendant Gateway has also moved for summary judgment dismissing the third-party complaint as against it on the same ground proposed by Flintkote's motion.

The following facts are not in dispute. On May 4, 1964 Gateway, a general contractor engaged in the building of an apartment house in Yonkers, New York, subcontracted to Westchester the installation of "Drywall" work

in the apartment house. Simultaneously Flintkote agreed with Westchester to finance its performance of the subcontract by advancing to it monies required by Westchester to meet its payrolls and purchase materials for performance of its subcontract with Gateway. Simultaneously Westchester assigned to Flintkote all its right, title and interest in that contract. Gateway accepted the assignment and agreed to pay directly to Flintkote all monies due Westchester under its subcontract with Gateway. Flintkote, on receipt of said payments, was to apply them to Westchester's account as payment for interest, materials and payroll advances, with any balance to be remitted to Westchester.

Pursuant to these arrangements Westchester performed its contract with Gateway and Flintkote supplied the materials and advanced cash to Westchester and received payments from Gateway on the assigned Gateway-Westchester contract.

In the meantime Westchester failed to pay to the Government certain payroll taxes generated by its work for Gateway. The Government then made tax assessments against Westchester totaling $8,540.80, and liens and levies were filed. Notices of levy under the tax liens were served on Gateway on October 29, 1964 and November 12, 1964. Disputes between the parties followed, culminating in a suit in the New York Supreme Court, Westchester County, by Gateway against Westchester, Flintkote, the United States and the Ruberoid Company. The second cause of action of that suit sought, in part, a declaratory judgment that claims asserted by the two latter defendants (United States and Ruberoid) against funds due to Westchester from Gateway were invalid, but Ruberoid was never served and the action was discontinued as to

the Government, without prejudice. In that suit, however, Flintkote brought a counterclaim against Gateway alleging that Gateway owed Flintkote $51,143.78 and interest predicated upon the assigned Gateway-Westchester contract, and a cross-claim against Westchester for monies owed under the aforementioned Flintkote-Westchester contract and a guaranty that was not related to their agreements in this commercial endeavor.

On September 12, 1966, Flintkote entered a judgment by default against Westchester on Flintkote's cross-claim for monies due under their financing agreement and the unrelated guaranty. No part of the default judgment has been paid and due to Westchester's insolvency it is uncollectible. On March 31, 1967 Flintkote and Gateway entered into a settlement agreement and withdrew their pleadings against each other in the Westchester County action. That settlement provided that Gateway would pay Flintkote $30,000, $10,000 of which was to be held in escrow until the rights of the United States, pursuant to its tax claims, could be determined.

As noted at the outset, in the suit removed to this Court Flintkote sought a declaratory judgment that the notices of tax liens and notices of levy thereunder do not apply to any part of the settlement money paid by Gateway. The Government's response, and only asserted defense, has been its counterclaim and third-party complaint brought under Article 3-A of New York's Lien Law. The Government argues that the motion for summary jdugment should be denied not only because there are issues of fact to be resolved but also because, even assuming that there are no issues of fact, the Government has a right to interpose its third-party complaint and counterclaim.

Opinion of Judge Mansfield

The only asserted genuine issue of fact pointed to by the Government is the question of when Westchester finished its work under its contract with Gateway. This fact might be significant with respect to the applicability of the period of limitations contained in Lien Law §77(2). Movants contend that since the work in question was completed more than a year prior to the time when the Government commenced its Article 3-A Lien Law proceeding by the filing of its third-party complaint on September 12, 1968, the Government's lien is barred. Although the Court, for reasons stated below, does not accept movants' interpretation of the statute, it is clear that regardless which construction is adopted, if the work remained uncompleted within the one-year period, the lien proceeding would not be barred.

The Government has not submitted any affidavits indicating that the work remained uncompleted on September 12, 1967; instead it relies on its statement filed pursuant to Rule 9(g) of the General Rules of this Court to the effect that there is a genuine issue to be tried as to the material fact of "[w]hen the work in question was completed. . . ." However, "mere conclusionary affidavits that an issue exists no longer suffice to defeat well grounded motions for summary judgment. *Wilson Jones Co.* v. *Gilbert & Bennett Mfg. Co.*, 332 F. 2d 216, 218 (2d Cir. 1964). *A fortiori* a conclusionary statement filed pursuant to Rule 9(g) of this Court's General Rules has little, if any, value. On the other hand, movants have not complied with this Court's Rule 9(g) and the evidence they have submitted as to when the work in question was completed is not in conformity with the dictates of Rule 56(e), F. R. C. P. They rely first on an attorney's affidavit to the effect that the work in question was completed in August 1964. Since the affidavit is not based on personal

knowledge, however, it is of little value. Second, movants have submitted to the Court an unsigned copy of a notice of lien purportedly sworn to by Westchester's president, which indicates that the work in question was completed on October 30, 1964. This unsigned document does not set forth facts "admissible in evidence" as required by Rule 56(e). Absent any proof by competent evidence that the work in question was completed more than one year prior to the commencement of the lien proceeding, this Court has no alternative but to find that an essential question of fact is in dispute, and, therefore, to deny these motions.

Even assuming that the work in question was completed more than one year prior to the commencement of the Government's third-party action, the motions for summary judgment must be denied. Article 3-A of the New York Lien Law provides for the creation of a statutory trust out of the funds received in connection with contracts for the improvement of real property in New York. The purpose of the trust is to provide for the payment of obligations incurred in performing the contract, including tax obligations. See Lien Law §71. The means for enforcing such a trust are provided in §77 of the Lien Law, which authorizes the holder of any trust claim to bring a class action to enforce the trust. Movants urge that since the Government did not commence its proceeding until more than a year after completion of the work in question, §77(2) of the Lien Law calls for dismissal of defendant's counterclaim and third-party complaint. Section 77(2) reads:

> "2. Such action may be maintained at any time during the improvement of real property or public improvement and successive actions may be maintained from time to time during the improvement provided no other such action is pending at the time

> of the commencement thereof. *No such action shall be maintainable if commenced more than one year after the completion of such improvement, except an action by the trustee for final settlement of his accounts and for his discharge.*" (Emphasis added)

Even if the above italicized sentence is construed as a statute of limitations, the one-year limitation would not bar the Government's present third-party complaint and counterclaim, since the United States cannot be barred by a state-imposed procedural limitation, see *United States* v. *93 Court Corporation,* 350 F. 2d 386 (2d Cir. 1965), *cert. denied,* 382 U. S. 984 (1966), and this suit is brought well within the six-year period of limitations set for the enforcement of liens by the Internal Revenue Code of 1954 §6502(a). Movants argue, however, that Lien Law §77(2) is not a mere statute of limitations but a condition precedent to the enforcement of an Article 3-A trust, and rely on the maxim that

> "Generally, where a statute creates a cause of action which was unknown at common law, a period of limitation set up in the same statute is regarded as a matter of substance, limiting the right as well as the remedy. *Osbourne* v. *United States,* 164 F. 2d 767, 768 (2d Cir. 1947).

As Article 3-A imposes a trust unknown to the common law, so the argument goes, this maxim would require a finding that the §77(2) limitation was a matter of substance which would be as binding on the United States as it is on private litigants. See *Custer* v. *McCutcheon,* 283 U. S. 514 (1930). We turn, therefore, to consideration of the purpose of this legislative enactment.

In furtherance of the general purpose of Article 3-A, which is to protect those having claims upon funds gener-

ated by work in connection with an improvement of real property in New York by providing that such funds shall constitute a trust for the benefit of such claimants, the statute goes on to provide:

> "3. Every such trust shall commence at the time when any asset thereof comes into existence, whether or not there shall be at that time any beneficiary of the trust. The trust of which the owner is trustee shall continue with respect to every asset of the trust until every trust claim arising at any time during the improvement has been paid or discharged, or until all such assets have been applied for the purposes of the trust. The trust of which a contractor or subcontractor is trustee shall continue with respect to every asset of the trust until every trust claim arising at any time prior to the completion of the contract or subcontract has been paid or discharged, or until all such assets have been applied for the purposes of the trust. Upon termination of the trust by payment or discharge of all the trust claims, the beneficial interest in any remaining assets shall vest in the owner, contractor or subcontractor, as the case may be." Lien Law §70(3)

The foregoing language, when read with the other provisions of the Lien Law, manifests plainly an intent to continue the trust in existence after the expiration of the one-year period fixed in §77(2), the latter provision being enacted as a means of enabling the trustee to ascertain claims for purpose of distributing the fund. For an analogous construction of a similar statute, see *Zuroff* v. *Westchester Trust Co.*, 273 N. Y. 200 (1937).

Equally significant is the fact that under the Lien Law in question the trustee's power to accept or reject claims

is not terminated by the statute. He is granted the option to assert the statutory time period as a defense to any claim, thus treating the time period as an affirmative defense in the nature of a statute of limitations rather than a condition precedent to be complied with by the claimant. Thus, a rapid distribution of the assets is to be achieved under the statute not by putting the burden on claimants to assert their claims within a set time period but by permitting the trustee to bring an action "for final settlement of his accounts and for his discharge." Lien Law §77(2).

The legislative history of §77(2), though perhaps ambiguous, provides support for the conclusion that it was intended to be a procedural statute of limitations rather than a substantive condition to enforcement of a claim. In reference to the antecedent of the present §77(2), the 1942 Report of the Law Revision Commission says at p. 285:

> "A *procedural* article is proposed to be added to the Lien Law, which provides for the enforcement of the trust by representative action. It also includes . . . a short *period of limitations*. . . ." (Emphasis added)

Finally, Article 3-A being a creature of New York State law we must pay particular attention to New York decisions interpreting its purpose. In the only New York case we have found which has faced the question herein and dealt with the statute's purpose, *Davis & Warshow v. Iser, Inc.*, 30 Misc. 2d 528, 220 N. Y. S. 2d 818 (Sup. Ct. N. Y. Co. 1961), the court held that the time period in Lien Law §77(2) is a procedural, rather than substantive, defense and consequently not a condition precedent but a statute of limitations. In *Davis* the defendant took

the position that the trust terminated at the expiration of the one-year period so that the contractor thereupon had property, or rights in property, in indebtedness owed him by the owner to which a federal tax lien could immediately attach upon the trust's expiration. The court held, however, that the statutory trust could "continue even after the expiration of the one-year period of limitation." *Davis & Warshow* v. *Iser Inc., supra* at 538. It relied, in part, on the Law Revision Commission's 1942 Report describing the statute as " 'a short period of limitations' " and said:

> "This denotes a procedural defense—which may or may not be affirmatively interposed by an appropriate party in interest, not the Government on the basis of a tax lien—rather than a condition precedent to the substantive 'right' of the beneficiary to the 'property' involved. . . ." *Davis & Warshow* v. *Iser Inc., supra* at 533.

Comparing Article 3-A with other provisions of the Lien Law the court went on to say:

> "These trust fund provisions are in sharp contrast to the provisions of the Lien Law giving a lien to persons for work done or materials furnished in respect of the construction or demolition of a public improvement. Such a lien 'shall not continue for a longer period than six months from the time of filing the notice of such lien, unless an action is commenced to foreclose such lien within that time,' and an appropriate notice of the pendency of such action is filed, or unless a court of record orders the lien continued (Lien Law, §18). Thus, in case of the trust, the statute prevents the *maintenance* of

> a representative action if not instituted within the prescribed one-year period (Lien Law, §75), whereas, in case of the lien, the statute *terminates* the lien unless a foreclosure action is commenced within the six-month period or the lien is continued by court order (Lien Law, §18)." *Davis & Warshow* v. *Iser Inc.*, 30 Misc. 2d 528, 538-39, 220 N. Y. S. 2d 818 (Sup. Ct. N. Y. Co. 1961).

The above analysis is in accord with the reasoning outlined by New York's Court of Appeals in *Zuroff* v. *Westchester Trust Co.*, 273 N. Y. 200 (1937), and supports our conclusion that if the trust continues for all purposes after the period of limitations, then that period is only a procedural statute of limitations not binding on the United States.

Lastly, this Court has once before dealt with the question of whether §77(2) was a statute of limitations or a condition precedent and, after exploring the statute's legislative history and the reasoning of *Davis & Warshow* v. *Iser Inc.*, *supra*, concluded that the limitation was a procedural statute of limitations and not a condition precedent. *Terns* v. *Whispell*, 227 F. Supp. 498 (S. D. N. Y. 1964). We subscribe to the views asserted in that decision.

Accordingly the Government, not being bound by the State statute of limitations, has properly interposed its third-party complaint and counterclaim and the motions for summary judgment are denied.

It is so ordered.

Walter R. Mansfield
U. S. D. J.

Dated: February 18, 1969.

Opinion of Judge Frankel, Dated January 12, 1970

Frankel, D. J.

In their thorough and lucid papers, counsel for Flintkote and Gateway urge that the question of law (as to the one-year limitation) resolved against them by Judge Mansfield in his detailed opinion of February 18, 1969, remains decisive; that Judge Mansfield's opinion would logically have justified summary judgment for the United States and an appeal therefrom; but that the occasion for such a judgment was not presented because there had been no cross-motion. It is then urged that the court should now "be persuaded to change its mind, in view of a later decision rendered by the New York Court of Appeals, which seems to be inconsistent with the result here." Memorandum in Support of Motion, p. 2. Otherwise, these movants urge, the government ought to have summary judgment in its favor, so that the legal question heretofore resolved by Judge Mansfield may be considered on appeal.

The government, while it now interposes further points not made to Judge Mansfield, obliged by moving for summary judgment.

I have examined the later New York dicta invoked by Flintkote and Gateway and find no basis *in them* for departing from the conclusion reached by Judge Mansfield. And whether or not I am strictly bound by his decision as the "law of the case," I would think it an inefficient and unjustified squandering of the court's time to work *de novo* through the research and analysis upon which he reached his decision. Such a project would seem especially profligate in light of the evident prospect that three judges of our Court of Appeals will be asked soon to consider this subject of New York law for themselves.